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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 209

EMICH MOTORS CORPORATION AND U. S. ACCEPTANCE CORPORATION,

Petitioners,

vs.

GENERAL MOTORS CORPORATION AND GENERAL MOTORS ACCEPTANCE CORPORATION,

Respondents.

RESPONDENTS' REPLY TO SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE.

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November 9, 1950.

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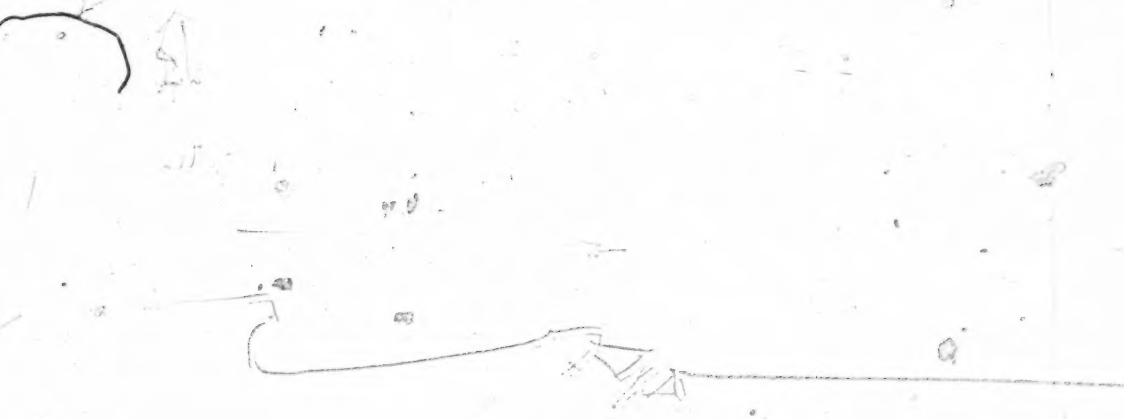

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The Solicitor General is correct in stating that his first memorandum "dealt with the question of * * * the precise scope and application of Section 5 of the Clayton Act." (Supp. Memo., p. 1.) In fact, it dealt *only* with that issue.

At the request of counsel for petitioners (Supp. Memo., p. 2), however, the Solicitor General now suggests that "the relationship of that issue" to the "other issues decided by the Court of Appeals" is such that the review by

plemental Memorandum does not attempt to point out what the alleged relationship between the issue under Section 5 and the other issues is, and in fact does not even state the other issues.

The "other issues decided by the Court of Appeals" were:

1. That "if defendants could show that they cancelled the dealerships for any other reason than Emich's failure or refusal to use GMAC, then the cancellations could not be said to be in furtherance of the illegal conspiracy" charged in the complaint. (R. 9459.)

2. That General Motors did not "have to stand idly by while any of its dealers engaged in business practices calculated to bring themselves into disrepute and reflect discredit on the manufacturer who licensed them to engage in business." (R. 9464.)

3. That evidence that plaintiff's dealerships were cancelled because of their unscrupulous and fraudulent financing practices was improperly excluded. (R. 9464-9465; cf. Petn. for Cert., Specification of Errors 2 (a), (b), 5.)

4. That evidence of plaintiffs' actual "irregularities" was admissible to "substantiate" the defense that "serious irregularities as to plaintiffs' financing practices" was one of the "principal reasons for cancelling the franchises." (R. 9463; cf. Petn. for Cert., Specification of Errors 2 (c).)

5. That the "exclusion of the evidence relating to finance which * * * wrongfully prevented a fair presentation of a legitimate defense was rendered even more prejudicial" by the arguments to the jury of plaintiffs' counsel. (R. 9464-9465; cf. Petn. for Cert., Specification of Errors 3.)

6. That "complaint letters received by them (defendants) should have been admitted, not for their testimonial use, to prove the facts contained therein, but to show the information on which they (defendants) acted. This is a well-established exception to

the hearsay rule." (R. 9466; cf. Petn. for Cert., Specification of Errors 2 (a), (d).)

7. That evidence of damages was "speculative and conjectural" in the extreme, being based on (a) unauthenticated books; (b) Emich's testimony as to lost business taken solely from "his mind and heart"; (c) an assumed profit obtained by adding to net profits all "federal taxes" and "salaries to officer-owners"; (d) an arbitrary and unsupported formula for determining good will; and (e) an improper cumulation of assumed lost good will and assumed lost earnings. (R. 9468; cf. Petn. for Cert., Specification of Errors 4, 6.)

None of these other issues* is peculiar to treble damage suits under the Clayton Act nor was there anything in the determination of these issues by the Court of Appeals which placed substantial or unusual burdens upon the plaintiffs in the instant case or upon any plaintiff in a treble damage suit. The decision below merely applied to the facts before the court general and established rules of evidence and law common to private litigation.

It is significant that none of these other issues was deemed by the Solicitor General to be of sufficient importance or sufficiently in the public interest to warrant review as recently as September 19, 1950, when the original *amicus* brief was filed. No mention was made in that document of any issue other than the question of the "precise scope to be given Section 5 of the Clayton Act." (Original *amicus* brief, page 1.) That section deals solely with the effect to be given a prior judgment or decree and can in no way relate to the issues as to which certiorari is now sought. It may also be significant that the Solicitor General does not attempt to indicate either the nature of the other issues or their alleged relationship to the issue under Section 5. Furthermore, the Solicitor General even

* The Court of Appeals also noted other errors by the trial court, on which it found it unnecessary to pass. (R. 9466.)

now avoids charging that the decision below was wrong or indicating what there is about the determination of any of the other issues that justifies consideration by this Court.

It is submitted that the limitations upon the scope of review imposed by this Court's order of October 9, 1950, should not be removed.

Respectfully submitted,

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